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In the Supreme Court of the United States

OCTOBER TERM, 1995

JOSIAH GREAVES, JR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

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December 1994

34 pp

QUESTION PRESENTED

Whether the petitioner was denied his Constitutional right to fully present a defense when the military judge ruled that petitioner could not testify in support of his mistake of fact defense regarding the alleged victim's employment as a Japanese club hostess who provided male patrons "female companionship," a euphemism for sex.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Josiah Greaves, Jr., respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on September 22, 1994.

OPINIONS BELOW

The order and judgment of the United States Court of Military Appeals,[1] No. 93-0203, slip op. (C.M.A. 22 September 1994) is located at Appendix A. The unpublished opinion of the United States Air Force Court of Military Review[2] is located at Appendix B.

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[1] The court has been subsequently renamed the United States Court of Appeals for the Armed Forces.

[2] The court has been subsequently renamed the United States Air Force Court of Criminal Appeals.

JURISDICTION

The final order of the United States Court of Military Appeals was entered on September 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1992) and 10 U.S.C.A. § 867(a) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment of the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .

STATEMENT OF THE CASE

The petitioner was charged with one specification of indecent assault in violation of Article 134, U.C.M.J., 10 U.S.C. § 934. Petitioner entered a plea of not guilty and elected trial before a court-martial panel consisting of officer and enlisted members. At trial, the defense case was centered around petitioner's mistake of fact as to the alleged victim's consent.

The petitioner, after hosting a party in his own home during which he consumed some alcohol, fell asleep in the early hours of the next morning. (R. 280, 282, 290). He awoke at some point, in his own bed, and discovered a female guest on his bed with her legs near his face. Her posterior was exposed under a tight mini-skirt, revealing that she was not wearing panties, although she did have

panyhose on. (R. 290-92). Petitioner knew she worked as a hostess in a Japanese club which served drinks and provided "female companshion" to male patrons. He believed that "female companionship" in Japan is a euphemism for sex. This knowledge was not presented to the members, because the military judge granted the government's motion in limine, relying on Mil.R.Evid. 412.

The appellant touched her on the calf of her leg to determine if she was awake. (R. 294-95). He testified that her resulting moans were of such a nature to indicate that she agreed to his "advances", which included his question whether she wanted to "fool around." (R. 295-96). She maintained that she was asleep but experiencing a vivid dream in which she was involved in consensual foreplay with a man. (R. 209). The appellant testified that she cooperated in removing her pantyhose, a fact she did not refute. (R. 296-98).

After he touched here in the "crotch area", which became "extremely wet", indicating to him that she was excited, he got out of bed, undressed, and returned to bed. At that point he placed his hands on her buttocks, whereupon, he testified: "her head snapped around and [she] looked at me in total disarray. I went into a complete panic. I didn't understand what was going on." (R. 300). He pulled the covers up and she ran out of the room. (R. 301).

REASONS FOR GRANTING THE WRIT

This Court has recognized the fundamental right of an accused to testify in his own defense, even when confronted with rules of evidence which would appear to restrict the exercise of his consitutional right. *Rock v. Arkansas,* 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (state *per se* rule excluding hypnotically refreshed

testimony found unconstitutional). Justice Blackmun, writing for the Court, found an accused's right to testify in his own behalf in the Fifth, Sixth and Fourteenth Amendments of the Constitution. 107 S.Ct. at 2708-2710. He added,

> Of course, the right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." [citation omitted]. But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.

1207 S.Ct. at 2711. Thus, any court which attempts to restrict an accused's right to testify must carefully balance the "legitimate interest" of the restriction against a fundamental constitutional right to testify.

In the case *sub judice,* petitioner maintains that the trial judge and the courts below excessively credited the protection afforded a prosecutrix under the military's rape shield rule, Mil.R.Evid. 412, in relation to appellant's right to testify in his own defense.

The government successfully convinced the trial judge to grant a motion in limine, prohibiting the petitioner from testifying regarding his knowledge that the alleged victim had been employed as a Japanese club hostess who provided male patrons "female companionship", a euphemism for sex. (R. 65-96, App. Ex. II, XV). The petitioner argued that this knowledge led to his honest and reasonable belief that she would be willing to participate in consensual sex with him, particularly where he awoke in

his own bed to discover her laying next to him. The military judge instructed the members regarding mistake of fact as an affirmative defense. (R. 415-16, 424-25).

The appellant did not desire to place her character in issue – rather he wished to fully inform the court members why he believed she was willing to "fool around" with him. When placed in the factual setting underlying the charge and specification, this additional information may well have influenced the members to acquit the appellant. Given his reliance on an affirmative mistake of fact defense, which was raised by the evidence, the suppression of this evidence constitutes a denial of his constitutional right to fully and fairly present a defense.

In two decisions by the Court Of Military Appeals which addressed the issues surrounding Mil.R.Evid. 412, Chief Judge Everett, concurring, rendered the opinion that defense-offered evidence regarding a prosecutrix' sexual behavior or reputation may be admissible as it relates to the mistake of fact defense, particularly when the accused had knowledge of the presecutrix' prior sexual behavior. *United States v. Elvine,* 16 MJ 14, 19 (CMA 1983); *United States v. Colon-Angueira,* 16 MJ 20, 30 (CMA 1983). These rulings, combined with *United States v. Dorsey,* 16 MJ 1 (CMA 1983), and *United States v. Holliman,* 16 MJ 164 (CMA 1983), clearly recognize that Mil.R.Evid. 412 is a rule of relevance, which must be balanced against an accused's right to present a defense. When the defense offers evidence which would otherwise appear to be inadmissible under this rule, the defense must show that it is relevant, material and vital to the defense to successfully invoke his constitutional rights. *Dorsey, supra* at 8.

Sergeant Greaves testified on the motion, explaining how his knowledge of the prosecutrix' employment as a hostess affected his state of mind, particularly in light of the fact that he discovered her *in his own bed.* In *United*

States v. Kelly, 33 MJ 878 (ACMR 1991), the Army Court of Military Review held that the military judge committed prejudicial error by ruling that Mil.R.Evid. 412 prohibited the admission of evidence of the prosecutrix' sexual activities. The court relied on the cases cited above in reaching their decision. Chief Judge Everett's opinion in *Elvine* on mistake of fact was specifically cited. *Kelly, supra* at 882. *Kelly* was decided after the petitioner's trial. The rationale underlying the court's holding, however, is equally applicable to this case. While the facts are somewhat distinguishable, the basic defense theory is the same, i.e., the petitioner's belief that the prosecutrix was receptive to sexual interplay with the petitioner.

The federal rape shield rule has been applied consistent with the above rationale. In *Doe v. United States,* 666 F.2d 43, 48 (4th Cir. 1981), the court held that an accused's knowledge of an alleged victim's past sexual behavior which was acquired before the alleged sexual assault is relevant on the issue of intent. In commenting on the legislatory history of rule 412, the court said, "There is no indication, however, that this evidence was intended to be excluded when offered solely to show the accused's state of mind." 666 F.2d at 48. Thus, the federal rule has been construed in a fashion consistent with the military rule. When an accused's state of mind is in issue, as in the application of the mistake of fact defense, then rule 412 must give way to the accused's constitutional right to present a defense.

CONCLUSION

Petitioner's defense was that he made a mistake of fact as to the alleged victim's consent. The court members were not made aware of what Sergeant Greaves was thinking when he awoke to find the prosecutrix in his bed. They did not have all the relevant information available to assist

them in deciding whether his mistake was credible, honest and reasonable. With this information, petitioner may well have been acquitted and petitioner has a constitutional right to present evidence in his own behalf. During Sergeant Greaves' trial, this right was not afforded him. A conviction under these circumstance cannot be allowed to stand.

Respectfully submitted,

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December 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 93-0203
1994 CMA LEXIS 114

UNITED STATES, APPELLEE

v.

JOSHIAH GREAVES, JR., SERGEANT
U.S. AIR FORCE, APPELLANT

Argued March 1, 1994
Decided September 22, 1994

Prior History: [*1] CMR No. 29113. Military Judge: James E. Heupel.

Counsel

For Appellant: Lieutenant Colinel Frank J. Spinner (argued); Colonel Jay L. Cohen (on brief); Colonel Terry J. Woodhouse and Captain Gilbert J. Andria, Jr.

For Appellee: Major Barnard N. Madsen (argued); Colonel Jeffery T. Infelise (on brief).

Judges: COX, SULLIVAN, CRAWFORD, GIERKE, WISS.

Opinion By: COX.

Opinion of the Court

COX, Judge:

This is another in the steady stream of sexual misconduct cases to come before this Court. Contrary to his pleas, appellant was convicted (with exceptions) of indecent assault on O, a female petty officer, United States Navy, in violation of Article 134, Uniform Code of Military Justice, 10 USC § 934.[1] At his court-martial, appellant did not dispute that he touched, fondled, and otherwise violated the victim, as alleged; nor did he contend that Petty Officer O actually consented to the conduct. Rather, his defense was that, under the circumstances then and there prevailing, he reasonably and honestly—albeit mistakenly—thought she was consenting. Consent, of course, can convert what might otherwise be offensive touching into nonoffensive touching—United States v. Joseph, 37 MJ 392, 396 n. 5 (CMA 1993); [*2] and a reasonable and honest mistake of fact as to consent constitutes an affirmative defense in the nature of legal excuse.[2] RCM 916(j), Manual for Courts-Martial, United States, 1984; United States v. Baran, 22 MJ 265, 267 (CMA 1986), United States v. Carr, 18 MJ 297, 301 (CMA 1984).F

By his own testimony, appellant plainly raised the defense theory of mistake of fact; and [*3] the military judge duly gave such an instruction at the close of the case. Appellant's complaint, both at trial and on appeal, is that he was prejudicially denied the right to introduce certain additional testimony in support of his theory. We granted review of this issue, as framed by appeallant:

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[1] On September 5-7 and 10, 1990, appellant was tried by general court-martial at Kadena Air Base, Japan. He was sentenced to a bad-conduct discharge, confinement for 60 days, and reduction to the lowest enlisted grade. The convening authority approved the sentence, and the Court of Military Review affirmed in an unpublished opinion.

[2] "Honest" and "mistake" are reundant. One is either mistaken or not.

WHETHER APPELLANT WAS DENIED THE CONSTITUIONAL RIGHT TO FULLY PRESENT A DEFENSE WHEN THE MILITARY JUDGE RULED, UNDER MIL.R. EVID. 412, THAT APPELLANT COULD NOT TESTIFY, IN SUPPORT OF HIS MISTAKE OF FACT DEFENSE, REGARDING THE ALLEGED VICTIM'S EMPLOYMENT AS A JAPANESE CLUB HOSTESS WHO PROVIDED MALE PATRONS "FEMALE COMPANIONSHIP," A EUPHEMISM FOR SEX.

Background Facts

On January 14, 1990, while appellant's wife and daughter were in the Philippines, appellant threw a party at his quarters on Camp Kinser, Marine Corps Base, Japan. His guests included Petty Officer O, Airman First Class Megan Nimmo, Sergeant Jim Entwistle, and Airman Jennifer Smith. Early in the morning of January 15, at about 2:30 or 3:00 a.m., Petty Officer O, Airman Nimmo, Sergeant Entwistle, and appellant went into appellant's bedroom to play a computer game. After playing the computer game for about 20 minues, [*4] Airman Nimmo left appellant's room and went to sleep in the other bedroom in appellant's house. At that time, only appellant, O, Nimmo, and Entwistle remained at the party. While watching Entwistle play the computer games, O fell asleep, fully clothed, on top of the covers on one end of appellant's bed. Appellant, also fully clothed, apparently fell asleep on top of the covers on the other side of the bed.

Petty Officer O testified that the last thing she remembered before drifting off to sleep was watching the computer games. The next thing she remembered was:

having a dream and realizing that it was very strange. It was . . . something was wrong.

Q. What was wrong?

A. It just felt like it shouldn't be happening. It was like a discolored dream. It was bad.

Q. Can you be a little bit more specific what the dream was about?

A. That somebody was performing foreplay with their fingers and their mouth in the vaginal area and around the buttocks.

Q. What is the next thing that you remember?

A. I remember waking up and I felt somebody shove away from me quickly.

Q. Where did you feel that shove?

A. On my buttocks area. [*5] Then I felt the covers being pulled from underneath me quickly. And as I turned to my left, I saw Sergeant Greaves pulling the covers up over his chest, which was—his chest was bare. His shoulders were bare.

Q. How was that movement of pulling the covers over himself? What was that like?

A. He was moving away from me backwards and pulling the covers with him. So it was pulling the covers from under me as I turned to look.

Upon waking, O also discovered that her "skirt was up and twisted around . . . [her] hips"; her "pantyhose were no longer on . . . [her] legs" which "was like a slimy feeling between . . . [her] legs." Realizing generally what was happening, she quickly jumped up and bolted from the room, repeating, "That's f ed up." According to O's testimony, appellant "was still in the room, somewhere behind me. He was saying 'Wait' or 'Stop, let me talk to you,' or something like that. But I was . . . (the witness was crying)."

Sergeant Entwistle testified that, after he had finished playing the computer game, he tried unsuccessfully to rouse O from her sleep. Entwistle drove O to the party and [*6] was to take her home. According to his testimony, Entwistle

shook her on the shoulder hard enough to wake her up but not hard enough to hurt her. And she mumbled "What?" And I left it as that she was tired. I figured that she maybe needed to sleep a little bit longer. . . .

[Her eyes] were kind of squinted from the light. . . .

It was about 4:15 a.m.

Unable to rouse her, Entwistle left the room for 15 to 20 minutes and began to straighten up the apartment from the party. The lights in the bedroom were left on, and the door was open. When he returned to the room, the parties were in the same positions as before. Again, Entwistle tried to rouse O "by shaking her." Again, "she just moaned," and her eyes were "still closed." Entwistle "went back out into the living room, sat down in the recliner, and dozed off."

The next thing Entwistle knew, O came streaming out of the room, shouting, "That's f ed up. That's f ed up." She appeared "upset, scared." Her clothes were dishevelled. Appellant "came out right behind her. . . . It looked like he was fastening his pants. He had no shirt on, no socks." Appellant "looked at . . . [Entwistle[and [*7] he [appellant] went, 'I f ed up.'"

Entwistle and O quickly rounded up their possessions and left. It was about 5:30 a.m. According to Entwistle, O cried all the way home.

Appellant testified to quite a different perception of the events. He corroborated falling asleep at the end of the bed opposite where Petty Officer O had been sitting. When he later awoke, only he and O were in the room, and O was asleep on top of the bed fully clothed. From these facts, appellant claims to have deduced that Entwistle had gone home, leaving O to spend the night, and that O was in his bed for a reason. Appellant testified that O's leg was next to his face and that he could see up her skirt. Not knowing whether she was awake or asleep, he touched her leg, and she started to moan. According to his testimony,

he asked her if she wanted "to fool around," and he took her moans to be a positive response. With O's assistance, according to appellant, he lifted her miniskirt, removed her panty hose, and began to fondle her ("she was flat on her stomach"). Appellant testified that O facilitated the "foreplay" by "moving around a little bit to kind of like assist me in finding the spot, you [*8] know, that most pleases her." By her conduct and affirmative response, appellant was "absolutely convinced" she was consenting.

Thus encouraged, he then got out of bed to remove his clothes. When he returned, he touched her buttocks, and she just ... like her head snapped around and looked at me in total disarray .... From the look on her face when she snapped up and turned around and looked at me, there was something definitely wrong. I mean, there was no longer any indication to me that she is going along with this at that time.

Appellant "went into a complete panic," claiming not to "understand what was going on." He tried to talk to O, but she rebuffed him and "stormed out of the room."

After Entwistle and O had left the house, appellant woke up Nimmo, who was still asleep in the other room, and related his version of the events to her. According to Nimmo, appellant made no pretense about being mistaken in thinking that O was actually his wife. However over the next days and weeks, as he admitted at trial, he falsely told several other people that, as he awakened from his sleep, he thought he was in bed with his wife.

Sometime after the incident, appellant approached [*9] Nimmo. As she testified:

He said that Petty Officer ... [O] had pressed charges and that his First Sergeant was probably going to contact me so that I could make a statement.

***

He asked me if I recalled him saying that he thought Petty Officer ... [O] was his wife. I said no.

The next time Nimmo ran into appellant:

He said that my statement would probably put him away.

***

He asked—he said, "I thought . . ." You know . . . "Didn't you remember that I thought she was my wife,"—Petty Officer . . . [O]. I said, "No, you never said that."

At the court-martial, appellant conceded that he was fully aware it was O at the other end of the bed. As he testifed: I made a decision that was really screwed up and messed up. . . . I thought it would be okay for me to have sex with someone who wasn't my wife in my own house. . . .

He denied that his prevaricating about his knowledge of the victim's identity was an attempt to establish a defense. He contended that it was merely an attempt to mollify his wife and save his marriage.

Nimmo also testified that appellant gave his explanation to her why she, O, and Airman Smith were invited to the party:

A. He said—he [*1O] told me later that we were—Petty Officer . . . [O], Airman Smith, and I were his favorite females from the club.[3] That he liked us all three, and he figured that, considering it was a drinking party, something was bound to happen.

Q. What did you take that to mean?

A. Sexual.[4]

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[3] In his off-duty time, appellant moonlighted as a bartender at the Airman's Club, Kadena AB, Japan.

[4] Appellant also had made a particular point of inviting everyone, including the women, to spend the night at his house. He explained this as a mere manifestation of his solicitude for their well-being, not wishing them to drive while intoxicated.

Based on a question posed by a court member, appellant acknowledged that Petty Officer O had given him no indication earlier that night that she was interested in receiving his advances.

The Excluded Evidence

In support of his theory of reasonable mistake of fact as to consent, appellant wanted to introduce some additional evidence about Petty Officer O's background. In appellant's view, this evidence made his mistake as to her consent all the more reasonable. Appellant wanted to testify that O had told him that, until recently, she had been working after duty hours "at the New Rose and being a hostess and entertaining married Japanese men at the bar." Appellant also wanted to testify that he understood, based on what O told him, that "she was the only person that was an American in that bar." Further, appellant wanted to testify that O reported earning "a good amount of money" working at the bar.

This information, coupled with the way appellant said she dressed for work at the New Rose—She was dressed to kill; lots of makeup. . . .

***

She is not hiding herself. She is exposing as much of her body as possible. She is wearing see-through shirts with very lacy type of bras and stuff like that, that when you are in the right light, you can see through the shirt and see the bra and things like that . . . [--]

suggested to appellant that "she was [*12] . . you know, doing, you know, in my mind she was free and easy and willing to do almost anything, with married or single people." Her alleged part-time employment led appellant to presume "that she was going to be more likely than not to give in to . . . [his] advances."

Appellant conceded, however, that his knowledge about the New Rose was very slim indeed. As he testified: "The bar that she worked at, the New Rose, catered to married Japanese – rich married Japanese personnel. It was a Japanese bar only...." Obviously, neither appellant or any of his friends had ever been to the New Rose. Indeed, apart from his fertile imagination, appellant admitted that he knew nothing at all about what went on at the New Rose and nothing at all about the victim's sexual history or inclinations.

Nonetheless, the defense argued that it was important to appellant's defense of reasonable and honest mistake of fact that he be able to testify that the victim worked at that bar and what that suggested to him.

The Government, on the other had, contended that such testimony was barred by Mil.R.Evid 412, Manual, supra (the "rape-shield" rule), see infra, and it moved in limine for the court [*13] to preclude the defense from attempting to introduce any "evidence" of Petty Officer O's "past sexual activity, including her employment at a bar off base."

The Ruling

The military judge made the following ruling: It appears to the court that the issue is as Trial Counsel indicates, whether the victim was consenting at the time. ... Any mistake of fact might well go to her actions at the time, based upon the information presented to the court and before it right now, any mistake at that time as to the signals she was giving. But based upon what the court has heard, the issue is not what was known about the victim prior to this time. It was: what were her actions at the specific point in time of the advances being made by Sergeant Greaves? And, on that basis, the court does not feel that mistake of fact based upon her prior employment as a hos-

tess, and the fact that the Accused assumed that she would be loose and therefore he was mistaken, that that would be reasonably in issue, at least at this point in time. ... The court does not find that this information would be constitutionally required to be presented. And, therefore, accordingly, M.R.E. [Mil.R.Evid.] 412 would prevent [*14] incursion into this area. Because, as I indicated and as Defense now concedes, where she worked is indeed specifically connected to sex [sic]. Everything about this comes down, in essence, to the insinuation being what the court raised in the first place, and that is that a female who works at a Japanese nightclub as a hostess is a euphemism for either a higher class prostitute or for a woman who is extremely loose and easy. That type of inquiry, whether it be from the Accused himself or being brought out by others concerning Petty Officer ... [O] is specifically what is forbidden by MRE 412.

He additionally found:

There was no evidence to show any kind of any flirting or any other affirmative actions by Petty Officer ... [O] that would show willingness on her part to consent to sexual intercourse with the Accused. The Accused did not know what her job as a hostess actually entailed. He didn't know whether or not she even left the New Rose with Japanese gentlemen. He knew only that she worked there as the only American hostess and he assumed that she had intercourse with patrons. At the time of the offense, she was no longer working at the club. The Accused was aware that she [*15] was no longer working at the club. The club she was working at, the New Rose, was an all Japanese club. Based upon what was presented, no Americans frequented that club. So the people she came in contact was, even if what the Accused assumed was true as to what she was doing, they were Japanese businessmen, essentially. Whereas the Accused is an American Caucasian.

The circumstances of the encounter with Petty Officer ... [O] were in no way similar to her prior employment. They did not, for instance, meet at the New Rose Club or at any other club and then go off somewhere together.

She wasn't invited to his house alone[;] it was a party that the Accused and Sergeant Bridges planned and she was specifically invited with others.

She was lying at the opposite end of the bed. She was dressed. She was not under the covers. She had not cuddled with the Accused in any way. There was no showing of affection in any way with the Accused.

Based on Mil.R.Evid. 412, the military judge granted the Government's motion in limine.

Analysis

With certain exceptions not here pertinent, Mil.R.Evid. 412 provides:

(a) Notwithstanding any other provision of these rules or this Manual, [*16] in a case in which a person is accused of a nonconsensual sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of such nonconsensual sexual offense is not admissible.

(b) Notwithstanding any other provision of these rules or this manual, in a case in which a person is accused of a nonconsensual sexual offense, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible.

(Emphasis added.)

Arguably, appellant's testimony did not fall within the literal language of Mil.R.Evid. 412 – since all he claimed to know for a fact was that O worked at a Japanese bar, dressed provocatively, and made good money. Nevertheless, it is clear that appellant wanted the court members

to project, along with him, that O was in fact a prostitute or at least an extremely "loose" woman.

Before deciding whether Mil.R.Evid. 412 barred anything, however, it is useful to determine whether the evidence in question met even the threshold requirement of relevance. As defined by Mil.R.Evid. 401:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence [*17] to the determination of the action more probable or less probable than it would be without the evidence.

Irrelevant evidence is not admissible. Mil.R.Evid. 402. Obviously, appellant's projected beliefs about O's sexual relations, if any, with persons unknown to him had no bearing whatever on whether O was actually consenting to him on the night in question.

The trial question was – would a reasonable person in appellant's position (i.e., knowing what appellant "knew") have made the mistake of believing that O was actually consenting then?[5] The evidentiary counterpart was – did what appellant claim to know about O make it more

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[5] It would seem that one is not being reasonable if one is being reckless or negligent. Thus it would seem that for one reasonably to believe something, one must have taken such measures as to not be reckless or negligent with respect to the truth of the matter. In other words, we must be seen as exercising due care with respect to the truth of the matter in issue.

An arguably better conceptual model recognizes that, in most cases, each element of each offense contains its own mens rea component, often implicitly; and mistake of fact is seen not as a common law "affirmative defense," but merely as an attack on the mens rea component of the particular element. See §§ 2.02 and 2.04, ALI Model Penal Code, reprinted in Model Penal Code and Commentaries (Part I) 225 and 267 (1985); W. LaFave and A. Scott, Substantive Criminal Law § 3.4 at 296 (1986).

reasonable for him to conclude, albeit mistakenly, that she was actually consenting to him at the time in question? The only answer here, in our view, is no. That she may have worked at a Japanese bar, dressed provocatively, and made good money in no way would add to the perception of a reasonable person in appellant's position that she was awake and consenting to his advances.

On the question whether a reasonable person would have believed that Petty Officer O was awake and capable of consent, her sexual history is clearly irrelevant. [*18] On the question whether appellant reasonably believed she was manifesting consent, the relevance of appellant's proffered evidence about her sexual history must be analyzed from two aspects: (1) Would a reasonable person believe, based on the quality and quantity of appellant's knowledge about O's past, that she was so indiscriminately promiscuous that she would consent to sex with him under the circimstances he described?; and (2) Assuming arguendo that a reasonable person could conclude, based on the information to appellant, that she was indiscriminately promiscuous, could a reasonable person then conclude that her moaning men "yes"? We need not reach the second question, because we conclude, based on appellant's meager proffer, that a rational factfinder could not conclude, much of anything about O's sexual practices. Thus we conclude that the proffered evidence did not even meet the threshold of relevance in Mil.R.Evid. 401 and 402. [6]

[6] *Doe v. United States,* 666 F.2d 43 (4th Cir. 1981), addressed admissibility of evidence of reputation or opinion or of past sexual acts, not to show that the alleged victim consented, but to support the defendant's defense of mistake of fact as to her consent. In Doe, the Fourth Circuit affirmed the "district court's evidentiary ruling ... pursuant to rule 412 of the Federal Rules of Evidence [holding] ... that evidence concerning past sexual behavior and habits of the prosecutrix was admissble in [a] rape trial." 666 F.2d at 45. The court stated that there was indication in Rule 412 that evidence targeted by the rule

We do not decide on this record that evidence of a presecutrix's sexual relations with others could never be probative of the reasonableness or actuality of an accused's mistake.

The military judge's Mil.R.Evid 412 analysis [*19] incorporated the four-part test articulated in *United States v. Dosey*, 16 MJ 1 (CMA 1983). Cf. *United States v. Williams*, 37MJ 352, 362 (CMA 1993) (Cox and Crawford, JJ., disagreeing with application of the Dorsey test). The judge determined that evidence of O's alleged previous employment at the New Rose was not relevant or/material and that, although as viewed by appellant it might appear favorable to the defense, its potential for prejudice outweighed its probative value in any event. We agree.

[*20]

We have said:

When the defense seeks to present evidence which is subject to the exclusionary provision of Mil.R.Evid. 412, it must clearly demonstrate that the proffered evidence is relevant, material, and favorable to its case. *United States v. Elvine,* 16 MJ 14 (CMA 1983); *United States v. Dorsey*, [16 MJ 1 (CAM 1983)]. Furthermore, the "probative value of" the evidence must outweigh "the danger of unfair prejudice." Mil.R.Evid. 412(c)(3)

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should be exluded on the issue of the accused's state of mind. 666 F.2d at 48.

However, the Fourth Circuit has since retreated somewhat from that position. In *United States v. Saunders*, 943 F.2d 388 (4th Cir. 1991), cert. denied, U.S., 112 S.Ct. 1199, 117 L.Ed.2d 439 (1192), Saunders was allowed to testify as to his own sexual experiences with the victim, but any evidence that others had exchanged drugs for sex with the victim was held inadmissible under Fed.R.Evid. 412. Without expressly deciding the correctness of *Doe*, but noting that it has been criticized, the Fourt Circuit upheld the district court's ruling. 943 F.2d at 391.

United States v. Fox, 24 MJ 110, 112 (CMA 1987).[7] See also *United States v. Hicks*, 24 MJ 3, 10 (CMA 1987), cert. denied, 484 U.S. 827, 98 L. Ed. 2d 55, 108 S. Ct. 95 (1987); *United States v. Hollimon*, 16 MJ 164, 165 (CMA 1983) ("Whatever type of evidence may be offered as to past sexual behavior of an alleged victim, the underlying analysis is the same; and, as we have made clear in other cases, it centers on the relevance, materiality, and favorability to the defense of such evidence"), citing *United States v. Dorsey*, supra; [*22] *United States v. Elvine*, 16 MJ 14 (CMA 1983). Mil.R.Evid. 412 is primarily a rule of relevance, and in our view, the defense has failed to demonstrate relevance of the evidence it sought to introduce. *United States v. Fox*, 24 MJ at 112. *See United States v. Colon-Angueria*, 16 MJ 20, 29 (CMA 1983) (Everett, C.J., concurring).[8]

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[7] Before Fed.R.Evid. 412 was enacted, *United States v. Kasto*, 584 F.2d 268 (8th Cir. 1978), *cert. denied*, 440 U.S. 930, 59 L. Ed. 2d 486, 99 S. Ct. 1267 (1979), was the leading case on reputation and opinion evidence of a victim's past sexual behavior in determining consent. In that case, the Eighth Circuit held that evidence of a rape victim's unchastity, whether in the form of testimony concerning her general reputation or direct or cross-examination testimony concerning specific acts with persons other than the defendant, is ordinarily insufficiently probative either of her general credibility as a witness or of her consent to intercourse with the defendant on the particular occasion charged to outweigh its highly prejudicial effect. ... 584 F.2d 271-72 (footnote and citations omitted). Both Fed.R.Evid. 412 and Mil.R.Evid. 412, Manual for Courts-Martial, United States, 1984, embody this rationale.

[8] See also *United States V. Pickens*, 17 MJ 391, 392 (CMA 1984) (victim's prior intercourse and flirtations with persons other than accused inadmissible); *Wood v. State of Alaska*, 957 F.2d 1544 (9th Cir. 1992) (fact that victim posed in "Penthouse" irrelevant to whether she would have sex with accused); *Jeffries v. Nix*, 912 F. 2d 982 (8th Cir. 1990) (evidence that woman exchanged sex for money in past not admissible under Iowa rape-shield statute, because there was no evidence

[*23]

[*24]

Additionally, appellant's claim that the excluded evidence was constitutionally required is without merit. "Rule 412 was premised on the precept that an accused does not have a constitutional right to present irrelevant evidence, and 'reputation and opinion concerning a victim's past sexual behavior are not relevant indicators of the likelihood of her consent to a specific sexual act or of her veracity.' " *United States v. Duncan*, 855 F.2d 1528, 1533 (11th Cir. 1988) (addressing issue of whether victim's chastity is admissible under Rule 412), citing *Doe v. United States*, 666 F.2d 43, 47 (4th Cir. 1981), cert. denied in *Duncan*, 489 U.S. 1029, 103 L. Ed. 2d 220, 109 S. Ct. 1161 (1989). "The exclusion of irrelevant evidence does not implicate constitutional concerns." *Allen v. Morris*, 845 F.2d 610, 614-15 (6th Cir. 1988), citing *United States v. Kasto*, 584 F.2d 268, 272 (8th Cir. 1978), *cert. denied*, 440 U.S. 930, 59 L. Ed. 2d 486, 99 S. Ct. (1979), [*25] *cert. denied* in *Allen*, 488 U.S. 1011, 109 S. Ct. 799, 102 L.Ed.2 790 (1989).

Appellant was not denied his mistake-of-fact defense, but was allowed to present evidence of the circumstances surrounding the events of the night. The members obviously did not buy appellant's defense. Evidence of the prosecutrix's previous employment as a hostess at a Japanese bar added nothing legitimate to the defense. *See Olden v. Kentucky*, 488 U.S. 227, 102 L. Ed. 2d 513, 109

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she offered to make such exchange here), cert. denied, 499 U.S. 927, 113 L. Ed. 2d 259, 111 S. Ct. 1327 (1991); *United States v. Duran*, 886 F.2d 167, 168 n.3 (8th Cir. 1989) ("Reputation or opinion evidence of past sexual behavior is totally precluded under Rule 412(a)."); *Eastwood v. Dept. of Corrections of State of Oklahoma*, 846 F.2d 627, 631 (10th Cir. 1988) ("Indications of a victim's promiscuity are not probative of either credibility or consent to sexual advances.").

S. Ct. 480 (1988). The military judge properly excluded this irrelevant evidence. See *United States v. Travers*, 25 MJ 61, 62-63 (CMA 1987).

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges CRAWFORD, GIERKE, and WISS concur.

APPENDIX B

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM 29113

UNITED STATES

v.

SERGEANT JOSHIAH GREAVES, JR., FR147-46-6935
UNITED STATES AIR FORCE

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5 October 1992

Sentence adjudged 10 September 1990 by GCM convened at Kadena Air Base, Japan. Military Judge: James E. Heupel.

Approved sentence: Bad-conduct discharge, confinement for 60 days, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens and Captain Richard W. Aldrich.

Appellate Counsel for the United States: Colonel William R. Dugan, Jr., Lieutenant Colonel Brenda J. Hollis, Captain Thomas E. Wand.

Before

O'HAIR, SNYDER, and GRUNICK
Appellate Military Judges

PER CURIAM:

Appellant was convicted by exceptions of a specification of indecent assault in violation of Article 134, UCMJ. The approved sentence includes a bad-conduct discharge, 60 days confinement, and reduction to E-1. While we find no prejudicial error and affirm, a discussion of some of the nine assigned errors is appropriate.

The President of the court in announcing findings used a worksheet that contained surplus language to their findings with exceptions. Not needed on the worksheet, but read by the President in announcing the court's decision of guilty, were the words, "with intent to gratify his lust or sexual desires."

As the President announced findings, the excepted language incorrectly sounded as if the court was finding the appellant not guilty of committing acts with the required intent to gratify his lust or sexual desires.

> PRES: Sergeant Josiah Greaves, Junior, this court-martial finds you:
>
> Of the Specification of the Charge: Guilty, except the words, "by touching her breasts with his hands" and "kissing her breast," *with the intent to gratify his lust or sexual desires.*
>
> Of the excepted words, Not Guilty.
>
> Of the Charge: Guilty.

The military judge immediately re-examined the worksheet and discovered the confusion caused by the reading of the surplus language. In an effort to clarify the findings, the military judge asked the court if they found the actions were performed by the appellant with the intent to gratify his lust or sexual desires. The President indicated "yes" and the military judge stated on the record he was getting an affirmative response from the court. Had that not been the verdict of the court, it makes sense that one

or more of the panel members would have raised a question. When provided the opportunity to clarify the issue, both trial and defense counsel declined.

From our examination of the worksheet we can see that the court panel was to consider five parenthetical phrases covering five allegations of indecent assault. They marked out certain phrases reflecting their decision that appellant was not guilty of two of the five allegations. The surplus language on intent was not a parenthetical phrase on the worksheet requiring specific marking by the court panel prior to the announcement of findings. In sum, based upon the entire record, we are satisfied that the appellant has suffered no prejudice from the ambiguity in the court's initial announcement. We are convinced the members found the appellant guilty of an indecent assault, "done with the intent to gratify his lust or sexual desires." The military judge properly sought clarification of the ambiguity in the announced findings. *United States v. Read,* 29 M.J. 690 (A.C.M.R. 1989); *United States v. Timmerman,* 28 M.J. 531 (A.F.C.M.R. 1989); R.C.M. 922 Discussion.

Appellant also complains he was prejudiced by a delay in post-trial review of his case by the Convening Authority. While the appellant was serving 60 days confinement, he petitioned the Convening Authority to suspend at least 1 day of confinement to make him eligible to enter a rehabilitation program for possible reentry into the Air Force. This request was made when the appellant had almost finished serving his confinement and before the record of trial was completed. Two typhoons and a murder trial created a reasonable delay in the transcription and authentication of appellant's 485 page record. In denying the request for suspension, the Convening Authority expressed an unwillingness to suspend a sentence that he had not yet approved. Counsel could have requested that the Convening Authority defer confinement until his

action on the record. We find no undue delay in record preparation but, had there been, counsel cannot sit by failing to request deferment and then complain that the appellant has been prejudiced by the service of confinement. We find no prejudice to the post-trial processing of appellant's record of trial. *United States v. Olivari,* 33 M.J. 933 (C.G.C.M.R. 1991); *United States v. Clevidence,* 14 M.J. 17 (C.M.A. 1982); and R.C.M. 1101(c)(3).

In clemency material to the Convening Authority, appellant presented a variety of information on the status of his security clearance. In the second addendum of the Staff Judge Advocate's recommendation, comments were made concerning appellant's security clearance. Appellate counsel complain this was an introduction of a new matter, requiring an additional opportunity for defense comment. This reference to security clearance in the second addendum arose from submissions by the accused and his defense counsel. It does not amount to a "new matter" requiring service upon either appellant or his counsel. *United States v. Clark,* 22 M.J. 708 (A.C.M.R. 1986); *United States v. Narine,* 14 M.J. 55 (C.M.A. 1982); and R.C.M. 1106(f)(7).

Appellant's challenge to the factual sufficiency of the evidence is based upon his asserted defense of mistaken belief that the female victim was consenting to his indecent advances. During a drinking party at appellant's apartment one of the female guests fell asleep, fully clothed and face down, on a corner of appellant's bed. Appellant awoke fully clothed on the opposite corner of the bed to find his sleeping female guest. With the absence of reciprocal conversation or affection, the appellant took the moans of his face-down sleeping guest, in response to his sexual touching, to be manifestations of consent. We have independently examined the evidence and it is sufficient to convince us beyond a reasonable doubt that appellant committed the offense. The record in our view amply supports the present conviction. *United States v. Turner,* 25

M.J. 324 (C.M.A. 1987).

We have considered the remaining assignments of error and have concluded they are without merit. The findings of guilty and the sentence are

AFFIRMED.

[SEAL OMITTED]

OFFICIAL

/s/ Naomi D. Allen
NAOMI D. ALLEN
TSgt, USAF
Chief Court Administrator, AFCMR

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